Judiciary of Sierra Leone
Fast Track Commercial Court

RULING

Date: 29th May, 2015

The Case between:

Union Trust Bank -Plaintiff/Respondent

Goal Sierra Leone -Defendant/Respondent

SIERRA WIFI LIMITED -Applicant/Applicant

Representations

R. Johnson (Lambert & Co.)

R.S.V. Wright

FTCC 034/15 2015. No.41

Judge: Hon. Mr. Justice Sengu M. Koroma

This is an application by way of Notice of Motion dated the 29th day of May, 2015 for the following orders:

1. That SIERRA WIFI (SL) Ltd. be made a party of in this proceedings in the form of an intervener on the grounds that its financial interests are materially affected in the matter herein, pursuant to the provisions of Order 18 Rule 6 (2) of the High Court Rules 2007 and Order 15 Rule 6 (2) of the Supreme Court Practice 1999.

2. An interim injunction restraining MESSRS Union Trust Bank (SL) limited, the Defendant/ Respondent herein from paying out the sum of US$ 56,310.80 or any other

sum being the value of the performance bond issued by it in favour of the Plaintiff/Defendant herein pending and determination of the matter FTCC 034/13 2013.9 No.41.

3. Any further or other Orders that this Honorable court may deem fit and just.

4. Cost in the cause.

The Applicant uses and relies on the affidavit of Ishmael Bull sworn to on the 29th day of May ,2015 together with the exhibits attached thereto.

The application is opposed by the Plaintiff/Respondent through the affidavit of ELSE KIRIK sworn to on the 5th day of June 2015 together with the exhibits attached thereto.

In his affidavit in support, Ishmael Bull deposed as follows amongst others.

a) That there was a contract between the Applicant herein and the Plaintiff/Respondent for the provision of certain services including but not limited to creating a website for use by the Plaintiff/Respondent herein and its contacts.

b) As required as part of the terms and conditions of the refereed contact, the Applicant herein instructed their bankers, the Defendant/Respondent herein to issue a performance guarantee in favour of the Plaintiff/respondents herein to the value of U$$ 56,310.80. The said Guarantee titled Performance Bond- L/G No. 786/8987-0517/14 issued by the Defendant/Respondent herein is exhibited 1. I.S.

c) That the said Performance Bond was issued on the Defendant/Respondents express terms and conditions in exhibit 1.5.3 He particularly refers to a term of the said contract which provides that the Plaintiff/Respondent was to make an initial deposit payment of U$$ 56,310.80 within 24 hours of the signing of the contract.

According to the deponent [redacted] , the Plaintiff/Respondent effected payment one (1) month after the same was due thus fundamentally altering and prolonging the time frame and tenure by which activities were to be completed.

d) That the Plaintiff/Respondent and the Applicant renegotiated certain aspects of the contract at least three times but this was never communicated to the Defendant/respondent.

e) That there was no breach of the existing contract between the Plaintiff/Respondents and the Applicant as the website which formed the substratum of the contract was up and running.

f) That the solicitors for the Applicant had by a letter dated 16th April, 2015 addressed to the Plaintiff/Respondent and copied the Defendant/ Respondent informed the Plaintiff/Respondent that they were not entitled to any payment and the bank ought not to pay them any money, by another letter dated 30th day of April 2015 written by the Applicant's solicitors to the Plaintiff /Respondent , the Applicant informed the solicitors of the Plaintiff/Respondent's intention to call on the performance bond.

g) That the above notwithstanding, the Plaintiff/Respondent proceeded with litigation solely against the Defendant/Respondent to the exclusion of the Applicant.

h) That it is imperative that the Applicant herein be allowed to become a party in the above mentioned matter so as to protect its integrity and reputation and ensure that the outcome of the matter does not adversely affect its legal position.

In the affidavit in opposition sworn to by ELSE KIRIK, the deponents deposed as follows:

1. That exhibit I.B 2 is not the correct contract on which the performance bond was issued but rather it was issued on exhibit E K I

b) The deponent deposes that paragraph 8 is untrue.

i) 40 percent of the contract fee was US $ 52, 859/60 was to be paid upon signing of exhibit I.B 3 (The performance Bond)

ii) Initial payment to the Applicant was effected on 9th January, 2015.

IV) The Applicant never had any complaints about the manner and time of payment of the said 40 percent of the contract fee until the Plaintiff terminated Exhibit ''E K 1''

V) The relevant instructions to the Plaintiff's/Respondent's bank for payment of the said 40 percent contract fee to Applicant exhibited as ''E.K 2''

c) That paragraph 10 of the affidavit of Ishmael Bull is untrue. Exhibit ''E.K'' was never renegotiated on at least three (3) occasions by mutual consent

The facts are as follows:

i) When the Applicant failed to perform two deliverables under Exhibit E K 1, the Plaintiff/Respondent terminated the contract by letter dated 31st March, 2015.

ii) On receipt of the letter of termination, the Applicant contacted the Plaintiff/Respondent and pleaded to be given 24 hours to perform. The Applicant was to have reimbursed the Plaintiff with the sum of US $32,993/00 on or before the 10th April, 2015, because the scope of work to be performed by the Applicant was reduced to the development and hosting of the MAC website only.

iii) The Applicant was to have completed the revised scope of work within one (1) calendar day after signing the amended contract effective 3rd April, 2015, failing which, the Plaintiff was at liberty to claim the full amount of the performance bond issued by the Defendant/Respondent in the sum of US $ 56,310/80.

IV) When the Applicant failed to perform as agreed in the amended contract, the Plaintiff/Applicant called on the guarantee. The letter of termination dated the 31st March, 2015, the amendment to exhibit ''E.K. 1'' and the letter dated 13th April, 2015 to the senior Manager of the Defendant//Respondent are exhibited as ''E.K 3'', ''E.K. 4'' and ''E.K 5'' respectively.

d) The Plaintiff/Respondent never had use of the website or Application as the same was never launched.

The main issue for determination is whether the Applicant has the right to intervene in an action between the Plaintiff/Respondent and the Defendant/Respondent in respect of the enforcement of a performance Bond issued to the Plaintiff/Respondent at the request of the Applicant. The prayers for an interim injunction would only be considered depending on the ruling on the application for Order 1.

Counsel for the Applicant submitted that they are applying to be joined as a party in the proceedings because of the following reasons:

(i) That the Applicant has a strong interest in the matter.

(ii) The dispute is basically between the Plaintiff/Respondent and the Applicant and not actually with the Defendant.

(iii) The Applicant need to be party of in order for the Court to be able to determine whether the event leading up to the calling in of the performance Bond was justified.

IV) That the Applicant will lose financially and its reputation hurt if they are not allowed to defend their position

(iii) If the Applicant is permitted to become a party, it would apply for an interim injunction restraining the Defendant/Respondent from paying out any money to the Plaintiff/Respondent.

The Counsel for the Plaintiff/Respondent relied on the entire contents of the affidavit sworn to by Elsie Kirk. He submits as follows:

(i) The action is between the Plaintiff/Respondent and the Defendant/Respondent and the action is founded on Exhibit I.S. 3 – The performance Bond. He described Exhibit – E.K 1 as the underlying contract and Exhibit I.S. 3 as an independent and autonomous contract between the Plaintiff/Respondent and the Defendant/Respondent.

(ii) Exhibit I. S. 3 is a first written demand guarantee. The Applicant has no legal right to prevent the Plaintiff/Respondent from calling in on the performance Bond.

(iii) There was a demand made on this Defendant/ Respondent before the expiring date.

(IV) The Applicant can only intervene in the case of fraud.

(V) Whatever dispute there is between the Applicant and Plaintiff/Respondent should be settled in another forum.

Counsel for the Plaintiff/Respondent cited a series of authorities which I shall refer to in due course.

Counsel for the Applicant in reply stated that all the authorities cited by his colleague establish that the bank is obligated to pay on one unchanged, un-amended identical contract. He submits that as soon as the contract was amended, the guarantee no longer applies .He added that with full knowledge that the contractual has been reduced, a claim on the original 40 percent will amount to virtually to a fraudulent claim. Counsel for the Applicant concludes by submitting that as soon as the contract was varied and amended, the basis upon which the guarantee was issued disappeared.

At the request of the Court, Counsel for the Plaintiff/Respondent referred me to the entire content of exhibit E K 4 to explain the amendment to the Original Contract.

Before proceeding to determine and analyze the issues involved in this application, it will be necessary to state the law relating to interveners actions. Counsel for the Applicant submits that the application is made under and by virtue of Order 18 Rule 6 (2) and (3) of the High Court Rules, 2007 and Order 15 Rule 6 (2) of the English Supreme Court Practice, 1999.

Order 18 Rule 6 of the High Court Rules, 2007 provides as follows:

'' Subject to this rule, at any stage of the proceedings in any case or matter the Court may, on such terms as thinks just and either on its own motion or on an application''.

6 (2) (b) Order any of the following persons to be added as a party:-

(I) ''any person who ought to have been joined as a party or whose presence before the Court is necessary to ensure that the matter in dispute in the case or matter may be effectual and completely determine or adjudicated upon;'' or

(ii) ''any person between whom and any party to the case or matter where there may exist a question or issue arising out of or relating to or connected with the relief or remedy claimed in the case or matter.''

Order 18 rule 6 (2) and (3) describes the procedure to be followed in making the application. The provisions under Order 18 rules 6 and of the High Court Rules, 2007 are Ipisisima Verba Order 15 Rules 6 of the English Supreme Court Practice, 1999.

Generally in common Law and chancery matters, a Plaintiff who conceive that he has a cause of action against a Defendant is entitled to pursue his remedy against the defendant alone. He cannot be compelled to proceed against other person against whom he has no desire to proceed (see the English Supreme Court Practice, 1999 page 225 paragraph 15/6/8) which was quoted with approved by WYNN-PARRY J in DOLLFUS MIEG etc V- BANK of ENGLAND (1951) c.h 33. However under this rule, a person who is not a party such as the Applicant may be added as a Defendant against the wishes of the Plaintiff either on

application of the Defendant or on his own intervention, or in rare cases, the Court on his own motion. The jurisdiction of the Court under this rule is discretionary.

The scope of this rule, so far as concerns the joinder of parties not parties are broadly the same as the objects of the rules relating to third party proceedings, namely (a) to prevent multiplicity of actions and to enable the court to determine disputes between all parties to them in one action, and (B) to prevent the same or substantially the same questions or issues being tried twice with possibly different results. The main difference between these rules O 18 Rule 2 and third party proceedings is that a non- party (like the Applicant herein) can apply to be added as a party under O 18, and 2 but cannot apply under Order 19 to be added as a party.

To entitle a person with a party who is not a party to an action to intervene and to be joined as a party, the rule requires that would be interveners should have some interest which is directly related or connected with the subject- matter of the action. In other words, where the propriety or pecuniary rights of the intervener are directly affected by the proceedings as where the intervener may be rendered liable to satisfy any judgment either directly or indirectly. The ambit of this class has been materially widened by the decision of the English Court Of Appeal in GURTNER V- CIRCUIT (1968). I ALL. E.R 328, the effect of which is to include any case in which the intervener is directly affected not only in his legal right but in his pocket. (English Supreme Court Practice, 1999 page 227 paragraph 15/16/11).

In the instant case, the Applicant in his affidavit sworn to on the 29th day of May, 2015, has averred that if the matter proceeds in the absence of the Applicant, whatever decision is arrived at would seriously prejudice the Applicant in so far as it would irrevocably damage its business reputation. It would also amount to a declaration to the world at large that the Applicant is either incompetent or efficient or otherwise not able to meet his contractual obligations. The Applicant also alleges that the Plaintiff/Respondent did not fully comply with the terms of the agreement with the bank and also fully failed to inform the bank of amendments to contract. The Plaintiff/Respondent in his affidavit in

events that transpired justifies the call on the performance guarantee has to be looked into which makes it imperative for the Applicant to be joined as a party. Counsel for the Applicant concludes that the actual dispute is between the Applicant and the Plaintiff/Respondent and that the Defendant/Respondent be ordered to hold on to payment until the issues in dispute are properly adjudicated upon.

Counsel for the Plaintiff/Respondent in his submission states that the substance of the matter relates to Exhibit I.S. 3, the Performance Bond. He submits the Exhibit E.K. 1- (the main contract) is the underlying contract whilst Exhibit I.S. 3 is the independent and autonomous contract between the Applicant and the Plaintiff/Respondent. Exhibit I.S. 3, according to counsel is a first written demand guarantee and the Applicant has no right to intervene. He refers the Court to PAGET's LAW OF BANKING 12th EDITION page 730 paragraphs 34.2 which provides that '' the principle which underlies demand guarantees is that each contract is autonomous. In particular, the obligations of the guarantor are not affected by dispute under the underlying contract between the beneficiary and the principal''. Counsel also cites series of authorities – ESAL (COMMODITIES and REALTOR Ltd) V- ORIENTAL CREDITOR Ltd AND WELLS FARGO NA (1985) 2 Lloyd Rep. 546. Court of Appeal; EDWARD OWEN ENGINEERING Ltd –V- BARCLAYS BANK (per. DENNING M.R). Counsel concludes that, the only instance in which a Bank will lawfully fail to honour a demand guarantee is where fraud is involved.

Counsel for the Applicant replied that the failure of the Plaintiff/Respondent to inform the bank of an amendment to the contract relating to the costs makes the demand a fraudulent claim. In response to a question from the Court relating to reduction in the contract sum, Counsel for the Plaintiff/Respondent referred the Court to Exhibit E.K 4 which explains the circumstances surrounding and the terms of the said amended contract.

I have listened carefully to counsel on the issue of the Performance Bond/Performance Guarantee. It is important to clarify at the outset that in commercial transactions involving Banks, the terms ''Performance Bond'' and ''Performance Guarantee'' are used interchangeably.

Performance Bonds are a form of financial surety put up by the contractor in order to provide the employer with a specific sum in the event that there is a default in the performance of the contract. Generally, Performance Bonds fall into two categories: **"on demand bonds''** or **''on default bond''. With ''on demand bonds''** payment is triggered simply by service of a written demand. On default bonds require not only the service of a written demand on the bank, but also proof that the contractor is in default and has caused the employer loss. The premium required for these bonds are less than ''on demand Bonds'.' From the submissions made by Counsel on both sides, it seems Counsel for the Plaintiff/Respondent is arguing that- the Bond issued by the Defendant/Respondent is in the nature of an ''ON DEMAND BOND'' whilst Counsel for the Applicant is saying that it should be treated as an ''ON DEFAULT BOND''

I have carefully studied exhibit I.S. 3 (The performance bond dated the 29th December, 2014) and it is in my conclusion that it constitute that specie of guarantees known in commercial transactions as an ''on Demand Bond''. The principle is that where, therefore, a bank has given a performance guarantee, it is required to honour the guarantee according to it terms and it is not concerned whether either party to the contract which underlay the guarantee is in default (Per Denning M.R in EDWARD OWEN ENGINEERING LTD – V- BARCLAYS BANK INTERNATIONAL LIMITED (1978) ALL E.R 796). Paragraph 4 of the Performance Bond L/G No. 786-0517/14 is instructive. It states as follows: - '' We Union Trust Bank Limited, hereby affirm that we as Guarantors are responsible to you, on behalf of the supplier, up to a total of USD 56,310.80 and we undertake to pay you, UPON YOUR FIRST WRITTEN DEMAND declaring the supplier's default under the contract and without cavil or argument, any sum or sums within the limits of USD 56,310.80 as aforesaid, without you needing to prove or to show grounds or reasons for your demand or the sum specified therein.'' This is clearly a contract between the Defendant/Respondent Bank and the Plaintiff/Respondent. The Applicant is not a party to this contract. The duty of the Defendant/Respondent bank is to pay the sum of USD 56,310.80 therein stated in the guarantee. It is this characteristic which leads Lord Denning M.R in EDWARD OWN ENGINEERING CASE to describe performance bonds

as ''virtually promissory notes payable on demand''; a description which has been cited in numerous authorities in common law jurisdictions worldwide (PAGET'S LAW OF BANKING 12TH EDITION, paragraph 34.2 page 730). Wordings similar to those on exhibit I.S. 3 has been upheld as on demand guarantees in the case of ESAL (commodities Ltd and RELTOR Ltd –V- ORIENTAL GREDIT Ltd and WELLS FARGO NA (We undertake to pay the said amount on your written demand in the event that the seller fails to execute the contract in perfect performance'' were construed not to require the beneficiary to prove a failure to perform''. Similar words were also used in SIPOREX TRADE SA –V- BANQUE., INDOSUEZ.

However, there is an exception to the rule that the Defendant/Respondent is bound to honour its obligations under the performance bond. Counsel for the Applicant argues that the failure of the Plaintiff/Respondent to inform the Defendant/Respondent about an amendment or amendments to the underlying contract concerning the Contract sum amounts to a fraud. If counsel is right, in the light of the authorities, the Defendant/Respondent will not be under any obligation to honour its obligation under the Performance Bond.

The existence of a fraud in English Law (which is essentially the law with tremendous substantive and procedural influence on the laws of Sierra Leone) was recognized in relation to Performance Bonds by the Court of Appeals in **EDWARD OWEN ENGINEERING LTD** Case (Supra), and by the House of Lords in relation to both Performance Bonds and letters of credits in **UNITED CITY MERCHANTS** (investments) Ltd and **GLASS FIBERS AND EQUIPMENTS** Ltd –V- **ROYAL BANK OF CANADA, VITROREFUERZOS SA AND BANCO CONTINENTAL SA** (incorporated in Canada) In the words of Lord Diplock''. There is one established exception that is where the seller, for the purpose of drawing on the credit, fraudulently presents to the confirming bank documents that contains expressly or by implication, natural representations of fact that to his knowledge are untrue...''The fraud exception according to PAGET, is in reality a limitation on the guarantor's undertaking. A guarantor

does not undertake to pay on a demand which is plainly fraudulent. This limitation gives rise to two questions;

i) What constitutes fraud on the part of the beneficiary?

a) When the beneficiary has no right to the payment made under the underlying contract.

In the instant case, the Plaintiff has right to payment under the underlying contract, since the same contract itself clearly stated that the payment of any money under same is predicated on the Applicant providing a performance bond and the amendment itself E.K 4 , provides that if the Applicant fails to perform under the reduced term and make a refund of US $ 32,993 (which was due to refund because of failure to perform under the underlying contract) the Plaintiff/Respondent will have the right to terminate and call in on guarantee. The agreement was signed by the Applicant. The conditions relating to the performance under the underlying contract and its amendment has not been changed. I hold therefore that under this head, there has not been any fraud on the part of the Plaintiff/Respondent.

b) Bank's knowledge of the fraud.

The Defendant bank is not justified in refusing payment unless fraud is clearly established. A mere allegation of fraud is not sufficient. The Applicant must produce evidence of the fraud. Secondly, the Plaintiff must be given an opportunity to answer to the allegation. Its answer may disclose a genuine dispute. Thirdly, the evidence, together with any explanation offered by the beneficiary, must be such that fraud is the only realistic inference if the facts before the Defendant bank are consistent with honesty, then the Defendant bank must pay not withstanding that they are also consistent with fraud. (PAGET'S LAW OF BANKING, 12TH EDITION paragraph 34.9. I agree with this view and hold that on this second limb the Applicant has not proved fraud on the part of the Plaintiff/Respondent nor less that the Defendant has knowledge of it.

In view of the fact of this matter and in line of authorities cited, I hold that no exceptional circumstances have been provided to empower this Court to interfere with the machinery of the irrevocable obligation assumed by the Defendant/Respondent as per Exhibit I.S. 3 the Performance Bond. The Applicant cannot therefore intervene in a contract that is exclusively between the Plaintiff/Respondent and the Defendant/Respondent. There are other remedies open to the Applicant.

As I stated earlier, if the first Order prayed for is refused, it will not serve any useful purpose to grant the application for an interim injunction. In matters relating to irrevocable demand, as already stated, the only exceptional case where an injunction may be granted is where it is proved that the bank knows that any demand for payment is already made or which may thereafter be made will clearly be fraudulent.

There are two major hurdles to be cleared by the Applicant for an injunction restraining payment:-

1) To establish a serious issue to be tried that a fraud exception exists.

2) To establish that the balance of convenience is in favour of the grant of an injunction.

See HARBOTTLE (R D) (MERCANTILE Ltd –V- NATIONAL WEST MINISTER BANK Ltd (1978) Q B 146; TUKAN TIMBER Ltd-V- BARCLAYS BANK PLC (1987) I Lloyd's Rep. 171.

As to establishing ~~service~~ serious issue to be tried balance of ~~convenience~~ convenience, Paget submits that, in an interlocutory application for relief based on the fraud exception, what has to be established is a good arguable case that the only realistic interference is fraud. I have already held that this is not so in this matter.

As to the balance of convenience, the Applicant will almost invariably be faced with the submission that the balance of convenience is against the grant of an injunction because if the injunction is granted in circumstance where fraud exception is not subsequently made

out at the trial, the bank will have suffered damage to its reputation which will be both irreparable and incapable of precise quantification.

Before giving my orders I would want to warn Banks against clogging the wheels of commercial transactions by delaying in fulfilling their obligations under ''On demand guarantees''. The banks have an obligation to properly check the credit and contractual performance histories of their customers before issuing ''on demand or irrevocable guarantees'' in their favour. Granting the order herein will open the floodgates and undermine the role of on Demand Guarantee which is useful tool in commercial transactions.

On the bases of the reasons given herein, the authorities cited and the facts of the case as set out in the affidavits, I hereby order as follows:

1. That the application for SIERRA WIFI LTD be made a party to this proceedings in the form of an intervener on the grounds that it's legal and financial interests are materially affected in the matter herein pursuant to the provisions of Order 18 Rule 6 (2) and 6 (3) of the High Court Rules, 2007 and Order 15 Rule 6 (2) of the Supreme Court practice, 1999 is refused.

2. That the application for an interim injunction restraining Messrs Union Trust Bank (SL) Limited the Defendant/Respondent herein from paying out the sum of US $ 56,310.80 or ANY OTHER SUM BEING THE value of the performance bond issued by it in favor of the Plaintiff/Respondent herein pending the hearing and determination of the matter FTTC 034/15 2015 No. 41 is refused.

3. Costs in the cause.

25th May, 2015